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**BEFORE THE  
STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS**

In the Matter of the Compliance with the    )  
Floodplain Shoreland/Wetland Zoning        )     IH-96-09  
Ordinance by the Village of Silver Lake,    )  
Kenosha County, Wisconsin                    )

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

On May 16, 1996, the Department of Natural Resources issued a decision approving Wisconsin wetland zoning amendments for the Village of Silver Lake, Kenosha County, Wisconsin. On June 13, 1996, Jo Matza and William Enderly filed a petition with the Department of Natural Resources requesting a contested case hearing pursuant to sec. 227.42, Stats., to review the decision to approve the zoning amendments. By letter dated July 3, 1996, the Department of Natural Resources granted the request for a contested case hearing in this matter. On July 25, 1996, the Department of Natural Resources forwarded this request to the Division of Hearings and Appeals.

Pursuant to due notice a hearing was held in Bristol, Wisconsin on October 7, 1996, before Mark J. Kaiser, Administrative Law Judge. A subpoenaed witness, William Marescalco, was unavailable to testify at the hearing. Mr. Marescalco was permitted to submit written answers to questions which were posed to him. Mr. Marescalco filed his answers on November 13, 1996. The parties were then given an opportunity to file comments on the answers. William Enderly filed comments on November 25, 1996.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

William Enderly and Jo Matza  
P. O. Box 752  
Silver Lake, Wisconsin 53170-0752

Wisconsin Department of Natural Resources, by

Thomas F. Steidl, Attorney  
P. O. Box 7921  
Madison, Wisconsin 53707-7921

## FINDINGS OF FACT

1. William Enderly and Jo Matza own five lots in the Village of Silver Lake. The lots are identified as lots 3, 4, 5, 6 and 7.<sup>1</sup> In this decision the five lots will be collectively referred to as the Enderly/Matza property. The Enderly/Matza property is located adjacent to the Fox River.

2. On February 7, 1996, the Village of Silver Lake (village) adopted Shoreland/Wetland Zoning Ordinances (Ordinance No. 360). The ordinance was adopted to fulfil the requirements of sec. 62.23, Stats., and Chapter NR 116, Wis. Adm. Code. The ordinance includes a map, entitled "Supplementary Shoreland and Floodland Zoning Map" (hearing exhibit 3), delineating areas within the floodplain and floodway of the Fox River. The map delineating the floodplain and floodway was adopted by the village in 1978.

3. On May 16, 1996, the Department of Natural Resources (Department) issued an order approving the village's shoreland/wetland zoning ordinance. On June 12, 1996, Ms. Matza and Mr. Enderly appealed the order approving the zoning ordinance. By letter dated July 3, 1996, the Department granted Ms. Matza and Mr. Enderly a contested case hearing pursuant to sec. 227.42, Stats.

4. According to the Supplementary Shoreland and Floodland Zoning map the Enderly/Matza property is within the floodplain based on the recorded elevations of the property. Once the extent of a floodplain is determined the floodway is delineated. "Floodway" is defined as "the channel of a river or stream, and those portions of the floodplain adjoining the channel required to carry the regional flood discharge" (sec. NR 116.03(22), Wis. Adm. Code). A floodway is determined by looking at the hydrology and hydraulics of a floodplain to determine where water will flow during a flood. The Enderly/Matza property is also within the delineated floodway.

5. Ms. Matza and Mr. Enderly are disputing whether their property should be within the floodway. No evidence challenging the analysis delineating the floodway was presented at the hearing. Mr. Enderly and Ms. Matza's primary argument is that their property was erroneously placed in the floodplain initially.

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<sup>1</sup>Ms. Matza and Mr. Enderly also own lot 8. However, they are not disputing the floodplain zoning of that lot.

6. The recorded elevations for the Enderly/Matza property are based on the elevation of the benchmark in Wisconsin Avenue (east quarter corner of sec. 18-1-20). This monument was destroyed during sewer construction in 1982. The monument was reset, but at a different elevation. The monument then apparently settled approximately four inches. A new elevation for the monument was established in August, 1996. Ms. Matza and Mr. Enderly allege that because of the discrepancies related to the elevation of this monument the recorded elevations of their property are not accurate.

Ms. Matza and Mr. Enderly believe that the elevation of their property is higher than the recorded elevations and that their property has erroneously been included within the floodplain. However, Ms. Matza and Mr. Enderly have not shown that the elevations of their property used to prepare the Supplementary Shoreland and Floodland Zoning map are inaccurate or even that the elevations were measured during the time period when the recorded elevation of the monument was in error.

7. Sec. 14.70 of the Village of Silver Lake Floodplain-Shoreland/Wetland ordinance sets forth the procedure for amending the ordinance including the maps which are incorporated as part of the ordinance. If Ms. Matza and Mr. Enderly believe their property has been incorrectly included within the floodplain boundaries, this procedure is available to them.

### DISCUSSION

Mr. Enderly and Ms. Matza challenge the Village of Silver Lakes Shoreland/Wetland Zoning Ordinance (Ordinance No. 360) on two bases. Firstly, they argue that the entire ordinance is not valid because its enactment did not comply with the procedure set forth by state statute. The record indicates that the hearing on the proposed ordinance was properly noticed and that the adoption of the ordinance was properly noticed and published. Based on the evidence in the record, the ordinance is valid.

Ms. Matza and Mr. Enderly's main dispute is that their property is included within the delineated floodway. Ms. Matza and Mr. Enderly have established that problems have occurred with the benchmark used to measure the elevations on their property. Despite the problems with the benchmark, based on the evidence in the record, the Enderly/Matza property appears to have properly been included within the floodplain. The village's ordinance incorporates the map entitled "Supplementary Shoreland and Floodland Zoning Map" by reference as part of the ordinance. There is no evidence that the problems with the benchmark effects the accuracy of this map. A survey of the lot on which Mr. Enderly and

Ms. Matza's house is located was conducted in 1975. According to the survey, the elevation of this lot is below the 100 year flood elevation. Ms. Matza and Mr. Enderly are not disputing the zoning of this lot; however, this lot is adjacent to the lots for which they are disputing the zoning.

Based on the evidence in the record, the Enderly/Matza property is within the floodplain boundaries. Once the floodplain was denominated, the floodway is determined by looking at the hydrology and hydraulics of the floodplain to determine where water will flow during a flood. Ms. Matza and Mr. Enderly also pointed out what they termed "inconsistencies" in the floodway determination. Although no explanation was provided for these possible inconsistencies, Ms. Matza and Mr. Enderly did not provide any evidence that their property should not have been included within the floodway.

Additionally, it should be noted that although the Department granted Ms. Matza and Mr. Enderly's request for a contested case hearing and they were allowed to present evidence on the issue of whether their property is on the floodplain of the Fox River, the Division of Hearings and Appeals does not appear to be the appropriate forum to decide these issues. Pursuant to sec. NR 116.21(6), Wis. Adm. Code, once the Village of Silver Lake adopted its Shoreland/Wetland Zoning Ordinance, changes in the official floodway lines or in the boundary of the floodplain area can only be made as amendments to the zoning ordinance.

Ms. Matza and Mr. Enderly may appeal to the Village Board of Appeals for such an amendment. The zoning ordinance adopted by the village prohibits structures designed for human habitation in the floodway. Mr. Enderly and Ms. Matza's concern about the impact of the zoning ordinance on their property values is understandable. However, the authority of the Division of Hearings and Appeal is limited to determining whether the zoning ordinance was properly adopted. Based on the evidence on the record, the ordinance was properly adopted.

#### CONCLUSIONS OF LAW

1. The Village of Silver Lake has complied with the procedural requirements of sec. 62.23(7), Stats., in adopting its Floodplain- Shoreland/Wetland zoning ordinance and the floodplain zoning ordinance complies with the requirements of Chapter NR 116, Wis. Adm. Code.

2. The Division of Hearings and Appeals has the authority pursuant to sec. 227.43(1)(b), Stats., to issue the following order.

ORDER

The order of the Department of Natural Resources approving the Village of Silver Lake Ordinance No. 360 is affirmed.

Dated at Madison, Wisconsin on January 8, 1997.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
5005 University Avenue, Suite 201  
Madison, Wisconsin 53705  
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By Mark J. Kaiser  
MARK J. KAISER  
ADMINISTRATIVE LAW JUDGE

ORDERS\SILVERLK.MJK

## NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.